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Roofing Claims in Florida – The Sky Is Falling

I. ROOFING CLAIMS

A. FLORIDA STATUTES AND CASE LAW OVERVIEW WHICH GOVERN ALL CONSTRUCTION DEFECT CLAIMS IN FLORIDA.

Florida has reserved an entire section (F.S. 553) to codify and enforce the Florida Building Code, which is adopted from the International Building Code (see F.S. 557.73(3)). The Florida's legislature has created a separate cause of action to bring claims for a breach to Florida's Building code, under F.S. 553.84 which states:

553.84 Statutory civil action.—Notwithstanding any other remedies available, any person or party, in an individual capacity or on behalf of a class of persons or parties, damaged as a result of a violation of this part or the Florida Building Code, has a cause of action in any court of competent jurisdiction against the person or party who committed the violation; however, if the person or party obtains the required building permits and any local government or public agency with authority to enforce the Florida Building Code approves the plans, if the construction project passes all required inspections under the code, and if there is no personal injury or damage to property other than the property that is the subject of the permits, plans, and inspections, this section does not apply unless the person or party knew or should have known that the violation existed.

F.S. CH. 558 - PRESUIT REMEDIES AND REQUIRED CONDITION PRECEDENT TO A 553.84 CLAIM IN FLORIDA.

In 2003 the Florida legislature enacted F.S. §558 to provide "an alternative method to resolve construction disputes" between owners and contractors. (Fla. Stat. §558.001 (2017)). The §558 process commences when a "claimant" serves a "written notice of claim" on the contractor describing the nature of any alleged defects, the location of each defect, and any resulting damages. The Florida Legislature created a statutory confidential settlement vehicle to potentially avoid costly litigation. F.S. Ch. 558 provides the contractor 60 days to inspect the property (or 120 days if an association exists with greater than 20 units), perform destructive testing if necessary, and gives the contactor the opportunity to make an offer to repair, provide financial compensation, or refute Plaintiff's claims (see F.S. Ch. 558.004). Should a party file a construction defect claim in Florida without first filing a 558 notice, any contractor may file a Motion to Stay the legal action and allow the parties to commence with the §558 process (see F.S. Ch. 558.003).

Although Florida's §558 process does not provide the contractor a right to repair, it does have its benefits. Because the §558 inspection is typically performed while the owner is present, offers to repair can be made directly to the owner, and said offers are confidential and inadmissible in future proceedings. Furthermore, the Florida Legislature snuck in this little gem, "if the claimant refuses to agree and thereafter permit reasonable destructive testing, the claimant shall have no claim for damages which could have been avoided or mitigated had destructive testing been allowed when requested and had a feasible remedy been promptly implemented. §558.004(2)(g).

B. TYPICAL ROOFING CLAIMS (99% OF ALL CLAIMS)

Florida, with its bright, sunny days and subtropical rainy climate has an abundance of roofing claims. Florida homes, for the most part is comprised of either shingle roofs, tile roofs or metal roofs. The traditional roofing claims have historically involved improper nailing patterns, drip edge and metal flashing issues, slipped or cracked tile systems, and termination flashings.

Overdriven/Under driven/Driven-Askew nailing patterns are prevalent in almost all mechanically attached roofing systems. The most prominent system associated with this category is the basic fiberglass shingle. Problems occur with regularity in the following categories: First: The number of fasteners installed. Manufacturers provide installation guidelines for basic 4 nailing patterns and for "Enhanced" 6 nail patterns. State and local building guidelines generally refer to the shingles manufacturers recommended fastener placement and number of nails in the specific product print outs, as well as on the product wrapper bundling the actual shingles. The number of fasteners required varies based on several variables, generally located in the municipality's published building codes. These variables include slope of the roof deck, mean roof height of the roof, special wind, or weather conditions such as high velocity hurricane zones designated in Florida and recognized around the country in mountainous regions

and especially along the coastal regions. Second: The placement/location of the fasteners may be the most crucial element. Low placement of nails will normally result in exposed nail head generally referred to as "shiners." These nails can be more easily loosened by continued exposure to the elements resulting in leakage.

A far more sinister problem occurs when nails are installed at a higher pressure than recommended, which creates an "overdriven" nail. This can result in increased susceptibility to wind uplift and detachment. Additionally, in laminated shingles, it is critical of the two individual shingle components to ensure that those pieces are mechanically attached in the field to complement the chemical sealant installed during the manufacturing process. If the nails are installed above this juncture, shingles installed on roofs with pitches 6/12 and above may separate either individually or in sheets reflecting what is many times miss-interpreted as wind damage. Lastly: Overdriven or 'canted' nails may result in a diminished ability to protect against strong winds.

The defenses to improper nailing claims are numerous, but the most successful rely on challenging the Plaintiff's expert on their sample size and their claimed damages. Often, Plaintiff's experts inspected and reported their findings based on a 10 square-foot section of roof on one building consisting of 2,400 square feet of roofing material in a development with 300 roofs. These experts will claim they can extrapolate their findings to the remaining 720,000 square feet of roofing in the community. Always look at the Expert's report, and regardless of how many photos they have depicting the nailing pattern concerns, take note of the sample size, including the area inspected, the address(s) and building(s) to determine whether over-extrapolation is an available defense.

Challenging the damage alleged by Plaintiff's Expert is also a key to defending nailing pattern deficiencies. Recall that Florida Statute Chapter 553.84 requires damage to personal "property or damage to property other than the property that is the subject of the permits". Florida requires roofers to pull permits, which are inspected by approved by the local municipality. Therefore, simply claiming the nailing pattern is defective does not meet the damage requirement. Challenge the expert to show damage to sheathing, interior damage to the home, or missing shingles. Most of the time, there is no evidence of damage.

Drip edge and headwall flashings are critical to the proper functioning of all roofing systems. Building codes vary dramatically from state to state. What is critical with eaves drip is the number and spacing of nails required in each area. This spacing can vary from 12" on center ("o.c.") to as little as 4" o.c. installed in a staggered pattern. Headwall flashings are installed over the roofing system and then secured using nails, screws, or adhesive to completely cover the headwall horizontal flange. The simplest defense to drip edge and headwall flashing claims are to challenge the testing

procedures. For example, without performing a water test, one cannot determine whether a leak (if one even exists) is originating in the stucco system above a headwall flashing detail, at a window above a headwall flashing detail, or whether the housewrap was improperly integrated and sealed. These tests are expensive, and require a keen eye, to avoid causing further damage to the existing building structure, and therefore many plaintiff's experts avoid them, which challenges their ability to prove causation.

The most common and easily identified roofing issues are loose/cracked tile and missing shingles, which allow water and ultraviolet light to deteriorate the sub roof and in turn allow water to penetrate beneath the roofing material. It is important to note that small cracks on the corners of tile in the overlap area are not a major concern if they do not exceed the head lap of the underlying tile. Obviously, all missing tile or shingles should be replaced as soon as possible to prevent interior damage. Missing roofing shingles and slipped roofing tiles are fodder for defense counsel. Because they are typically visible to the naked eye, they are considered patent defects and trigger Statute of Limitation in Florida (4 years). Furthermore, this condition, if left untreated by the Homeowner/Association, allows for a lack of maintenance, or failure to mitigate defense.

C. RECENT DEVELIPMENTS IN ROOFING CLAIMS

Do to the recent run-on stucco claims in Florida, many of the stucco contractors have exhausted their insurance policies. Plaintiffs cannot simply abandon their stucco claims, so they have resorted to alternative theories of causation for the stucco damage. Plaintiff's counsel has focused on alleging the stucco damage is a resulting damage due to other trades that adjoin the stucco system, including the window subcontractor, framing subcontractor, roofing subcontractor, and painter.

The area where the stucco and roof adjoin one another, which has seen the largest surge in claims, is located where the siding material, at the terminal point where the roof ends but the sidewall continues for some length, meets the roof line. It is critical the water from the roof is not allowed to enter the wall or building envelope, thus the necessity for the "kick-out" flashing. There are two general types of accepted kickouts that are used in Florida consisting of the manufactured kickout and the in the field-created kickout. The manufactured kickout is formed in a sheet metal facility and designed with an approximate 45 degree turn out to divert the water a minimum of 2" away from the adjoining vertical wall. The field-created kickout is an individual piece of metal flashing which is cut with shears and folded inwards over itself resulting in a unit that will set on top of the eaves drip to divert water away from the wall and the roof edge. This component can be soldered or sealed with an adhesive for additional protection. However, often the unit itself will be installed without soldering the flange folded. In order to make this fold, a microscopic 'hole' or opening can be present. This

very small opening can be and has been accused of causing excessive damage throughout the building envelope, specifically the stucco. While it is possible for a poorly designed or installed 'kick-out' flashing to leak, it is far more prevalent to find the source of leakage in other components in proximity. First, the microscopic hole in the corner will become clogged with dirt, granules, debris such as leaf residue as well as numerous other elements. Second, the 'hole' itself is located on top of us outside the eaves drip flange. Any water penetrating at that area would be led out on top of the eaves drip to the exterior. Third, any leakage would not only be miniscule in volume but would be highly localized to that immediate area.

The strongest defense to kickout claims is to challenge the evaluation performed to identify the alleged leak(s) in the area. Challenging plaintiff's experts to provide documentation of such testing is often easier than setting about having a defense expert do so, as plaintiff always has the burden of proof. Primarily the area where the eaves drip, fascia, or fascia cover intersect the stucco. These are areas of significant expansion and contraction and the actual sources for most leakage. Another roofing defense is to shed the blame on the subsequent trades, such as the stucco subcontractor. The stucco is applied after the roofing materials are in place with the eaves drip and fascia sealed in a bed of stucco. Therefore, any concerns with the kickout could have been addressed before the stucco contractor covered the area with their stucco. Additionally, the sealant contractor, painter, housewrap and/or stucco subcontractor are prime targets to shift the liability of the 'kick-out' diverter as the subsequent trades could have easily applied a flexible sealant (caulking), which is outside the scope of the typical roofing contractor. Ultimately, proper, analytical analysis of any leakage pattern is required to adequately determine the source of leakage at this very critical area. The leakage problem itself is much larger than a microscopic hole in the corner of the flashing. Significant dollars in claims are being paid expended to a lack of understanding of how to professionally analyze this specific and complex situation.

II. LEGAL ANALYSIS OF RELEVANT CASE LAW AND ITS EFFECTS ON CGL AND COVERAGE PROFESSIONALS

Events triggering defenses in Florida have been evolving rapidly. In Altman v. Crum & Forster, the Florida Supreme Court determined that the "written notice of claim" under Fla. Stat. §558 constituted a "suit" as it was considered an "alternative dispute resolution" proceeding, which was held to be a "claim" under the ISO format of insurance policy. *Altman Contractors, Inc. v. Crum & Forster Specialty Ins. Co.*, 232 So. 3d 273 (Fla. 2017). Specifically, the second sentence of the policy definition of "suit" broadened the term to include "[a]ny other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent." The Court held that F.S. §558 is a statutorily defined ADR proceeding, which involved damage potentially being claimed, but did not address the issue of carrier consent as it was outside the scope of the Certified Question. Accordingly, the F.S. §558 constituted a

"suit" and triggered the carrier's duty to defend Altman, which involved payment of its attorney's fees.

Another case which has a potential implication on coverage is Gindel v. Centex Home. In Gindel, the Homeowners filed a F.S. §558 Notice of Claim just prior to the expiration of the 10-year Statute of Repose. The filing of the F.S. §558 is a condition precedent to suing. After completing the F.S. §558 procedures, suit was filed after the 10-year Statute of Repose deadline. The Trial Court granted a Motion for Summary Judgment in favor of Centex Homes based upon the failure to file a Complaint within the 10-year SOR period. The Appellate Court concluded the Homeowners' compliance with the pre-suit notification requirements of Chapter 558 constituted an "action" for purposes of the Statute of Repose; thus, the action was not time-barred**.** Specifically, the Court held "we agree with the homeowners that F.S. §558 lays out a series of mandatory steps that must be complied with before judicial action is to be taken, and therefore, the pre-suit notice constitutes an 'action' for purposes of the statute of repose." *Gindel v. Centex Homes*, 267 So. 3d 403 (Fla. 4th DCA 2018) The Court analogized the F.S. §558 process with the mandatory, pre-suit requirements to filing a medical malpractice action. The Court did not want to penalize the Homeowners for complying with F.S. §558 and stated, "homeowners should not be penalized for rightly complying with the mandates of the statute." The Florida Supreme Court denied review of this decision.

Subsequently, the Florida Legislature amended F.S. §558.004 to clearly state that the filing of the F.S. §558 does not toll the Statute of Repose period. However, tolling of a statute is not the same thing as complying with the statute requirement as "tolling" is more in the nature of "stopping the clock" for a period, whereas "compliance" is the satisfaction of all requirements of a statute. Since the satisfaction of Florida's Statute of Repose can only be satisfied by commencing a legal action or proceeding within a 10-year time period, Gindel could be used to argue that a F.S. §558 Notice of Claim is a "legal proceeding or suit" which could fall under the definitions of a "suit" in an insurance policy, thereby triggering the obligations for a defense as a threshold matter. The fact there is no subsequent appellate history to clarify the ruling of Gindel and the Legislature's choice of wording that it shall not "toll" the Statute of Repose (as opposed to "it does not satisfy the requirements of the SOR") creates uncertainty as to exactly how F.S. §558 is to be viewed.

In addition to potentially triggering a carrier's obligation to providing a defense to its Insured, it affects the insured's obligations as well. If a F.S. §558 notice of claim is a "suit" for purposes of a CGL policy, the insured may now have an immediate obligation to tender the notice to their carrier or else potentially lose its coverage. And tendering a F.S. §558 Notice to a carrier can have financial implications on the Insured in increased loss runs resulting in increased premiums. This is particularly problematic when the claim is completely without merit (i.e., a roofing claims in purely stucco related, defect cases). Another implication is that carriers are more likely to retain defense counsel upon receipt

of a F.S. §558 notice, under reservation of rights, to satisfy their duty to defend the insured. And while there are benefit from §558 process in terms of early discovery, early retention can also result in increased attorney's fees over the life of the case.

III. ALTERNATIVE RESOLUTIONS TO CLAIMS

There are several alternative dispute resolution options, besides the typical settlement for a fixed dollar amount, which are available to the carriers/defendant roofer. Contractor self-performance which is typically offered during the §558 process. Blended contractor repairs whereby the manufacturer provides the materials, and the roofer volunteers the labor to resolve the claim, or the carrier agrees to a partial payment and the roofer self-performs repairs on an agreed upon roofing location. Last, but not least, settlement for a minimal amount with Plaintiff and assigning the roofer's rights to Plaintiff to seek downstream claims against the roofer's sub-subcontractors.

A. SELF–PERFORMANCE.

This is the simplest and quickest dispute resolution option, save for immediately offering money to resolve the claim. Self-performance of the roofing system repairs/replacement can oftentimes cut or completely avoid litigation costs if offered during the 558 processes. Furthermore, it can often reduce the impact on the plaintiff's home and mitigate any ongoing damage to other property, which saves the carriers money. Unfortunately, this option will not work when the homeowner or association has entered into a contingency retainer agreement with the Plaintiff's attorney as they will typically require financial compensation to release their lien rights against their client.

B. BLENDED SELF-PERFORMANCE

The second most common alternative resolution option is the blended self-performance offer. This option works well when the plaintiff has entered into a contingency agreement with their attorney, or when they have incurred significant expert costs to identify and trigger a defense of the alleged roofing claims. What we have had success doing is identifying they are legal fees and negotiating their fees down and having the carrier pay off the legal fee, or any legal liens (expert fees, court costs) and having the roofing contractor perform the repairs. This option typically is only feasible and cost effective on single family home claims, or in situations in which the scope of repairs is limited to a single location on multiple roofs, such as the kickouts. This option does not make financial sense when it calls for a complete reroof of an entire Association.

This option also works well when the manufacturer has been brought into the case. If the plaintiff will agree to a non-disclosure agreement, we have had great success involving the manufacturer in the settlement agreement, whereby they provide the roofing material(s) at their own expense, and the roofing contractor installs and incurs the labor cost. This is often incredibly beneficial to all involved, as the Plaintiff receives a partial or completely new roofing system, the manufacturer avoids a public record of a products liability resolution, the roofer controls the costs of repair and the carrier avoid the plaintiff's overblown repair costs.

C. SETTLE AND ASSIGN CLAIMS

The final alternative dispute resolution is only available when the roofing contractor utilized sub-subcontractors. Since roofers rarely utilize sub-subcontractors, this is a rarer occurrence and therefore is not as readily available to resolve the typical roofing claim. The process involves settling the claims with plaintiff, or third-party plaintiff, at a discount and assigning the remaining downstream claims to recover the remainder sought by same. This is not a common practice because it shifts the burden of proving the sub-subcontractor negligently performed their work to the party assigned the claims. The most often time this resolution is accepted by plaintiff is when the sub-subcontractor's carrier has exposed their insured and a bad faith claim is identified.

IV. **ALTERNATIVES TO (OUTDATED) ACCEPTED REPLACEMENT COST ANALYSIS**

A. BIDDING PROGRAMS vs. CONTRACTOR BIDS

Various bidding programs have been developed and are widely accepted throughout the insurance industry. They have taken every element in the various repair/replacement process and broken them down into itemized pieces with exact costs. This product has not only simplified and standardized the estimating process, but it has given insurance companies a standard upon which to make critical decisions. The question I pose is "At what cost?" The question itself implies there must be some added amount charged to use the product, and that is correct. The dividend to the insurance industry is obviously establishing a standard that can save time (which equates to money) and add an element of trust by attempting to ensure the estimating process is an "apples to apples" situation.

The system works because it simplifies the estimating process for analysis by the insurance companies. But who is evaluating the final product? It is in the end just a number, derived by feeding raw elements into a formula. What happens if the formula is flawed? Who is monitoring the formula? Is there any other manner of getting the same results that may result in exponential savings to the insurance industry bottom line?

First, you must understand there are contractors who specialize in insurance claims only, and there is a far larger group that deal with residential and commercial customers. These two groups very rarely intersect. The result is the insurance industry is not taking advantage of the largest group of contractors with the highest level of expertise. Second, you must understand why these contractors as a group do not want to bid insurance claim work. Prior to the establishment of the automated bidding programs used by the industry today, contractors were called for estimates, which they provided free of charge, for jobs they almost never were awarded. They tired of the worthless investment in time and resources and stopped engaging in "insurance work." The insurance industry was left with a large problem which was eventually addressed using the computer-generated estimates we use today.

The problem with the programs developed that deliver extreme detail by associating a cost to each component, is that the cost is duplicitous in several ways resulting in estimates that are generally 40% to 50% higher than these offered in the open market by reputable and experienced contractors. For example, we have found several "Insurance Claims Cost of Repair Experts" that will charge for the removal of the nails, removal of the shingles, removal of the underlayment and removal of the metal flashing, and then charge for the reinstallation and purchase of each component. The Defense to this is to use the overblown cost of repair estimate to impeach their expert's credibility and depose your own expert who took qualified bids which will typically be 40% cheaper for the carrier.

Since our time for this segment is limited, I cannot go into the depth of dissection this subject deserves. To summarize, I will provide you with a typical insurance quote for a roofing system from a contractor using the automated and generally accepted industry standard. I will also include two similar estimates for the same roof, submitted by long established local roofing contractors who do not deal with insurance adjusters. Again, time will not allow the scrutiny to each individual item, but duplication of both labor and material result in the ridiculous variances in costs. Multiply these individual costs hundreds of thousands of times and then evaluate if the cost for this system justifies itself.

Is there a better way going forward? Yes, we believe there is. In every local area there are accepted roofing costs recognized by all contractors. They have different bidding systems, different insurance and payroll structure, different overheads and highly different levels of knowledge and installation quality. Some regions have union costs - which I have seen NY expert consultants attempt to factor into a Florida bid (Florida is a right to work/anti-union state). The roofing contractor bids do have one thing in common, they must be competitive. That does not mean they need to be the cheapest, but they must find their market, one that allows them to compete and to make money.

How does the insurance industry tap into them? We could find sources within the roofing industry to help us focus on resources and possibly develop better programs that reflect true local cost considerations. We could use roof consultants familiar with regional costs and contractors. From a defense perspective, always hiring licensed roofing contractors to represent my roofing defendants, (when available) are preferred. We could pursue contacts with roof suppliers who deal with roofing contractors daily. Legal counsel can also pole existing client to provide a blind bid to expedite the process and develop their own understanding of the appropriate re-roofing costs. There is a plethora of alternatives available to research, which would deliver substantial savings to insurance companies and eventuate into lower premiums for all insureds.

This brief presentation is certainly not offered as an answer to a significant problem. It is offered as an opening gesture to further analyze in depth what we are accomplishing with our current system and how can we adjust, adapt, and continue to develop a system that will result in the best possible outcome.